

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

DOUG SUTHERLAND, et al.,

Defendants.

No. C06-1608MJP

ORDER REGARDING  
WEYERHAEUSER'S SURREPLY  
TO STRIKE DECLARATIONS OF  
EXPERTS CAREY, ROSENBERG,  
AND GLENN, AND DEPOSITION  
TESTIMONY OF JOSEPH  
BUCHANAN

This matter comes before the Court on Defendant Weyerhaeuser's surreply requesting that the Court strike the declarations of three expert witnesses (Dr. Andrew Carey, Dr. Daniel K. Rosenberg, and Dr. Elizabeth Glenn) and prohibit the use of deposition testimony from Joseph Buchanan. (Dkt. No. 158.) Plaintiffs have responded. (Dkt. No. 178.) Having considered the parties' papers, the Court DENIES Weyerhaeuser's request.

Weyerhaeuser moves to strike the declarations of three of Audubon's expert rebuttal witnesses on two grounds: (1) the experts were not disclosed within the period specified in Fed. R. Civ. P. 26(a)(2)(C); and (2) it would be fundamentally unfair to force Weyerhaeuser to address Audubon's rebuttal experts at this late date and within the time allotted during the four-day hearing scheduled on Audubon's preliminary injunction motion. Alternatively, Weyerhaeuser requests that the Court strike the current preliminary injunction hearing date and schedule to allow for evaluation of the new witnesses and provide for a longer hearing.

1           Weyerhaeuser argues that under Fed. R. Civ. P. 26(a)(2)(C), Plaintiffs rebuttal expert  
2 disclosures were due by April 21 and 25, 2007, thirty days after Defendants made their expert  
3 disclosures. But Rule 26(a)(2)(C) sets the time frame in which disclosures must be made before trial.  
4 Rule 26(a)(2)(C) is inapplicable here, where the parties are not preparing for trial, but for a  
5 preliminary injunction hearing. Moreover, the parties' stipulated briefing and disclosure schedule  
6 does not prescribe the date by which Plaintiffs needed to disclose their expert rebuttal witnesses.  
7 Instead, the schedule states that "[b]y May 18, 2007, Plaintiffs will file their reply in support of their  
8 motion for preliminary injunction, along with any rebuttal declarations and exhibits." Nothing in the  
9 stipulated schedule indicates that Plaintiffs' rebuttal disclosures were required earlier. Because  
10 Plaintiffs filed their rebuttal declarations and exhibits on May 18, 2007, in conjunction with their reply  
11 briefing, their disclosure was not untimely.

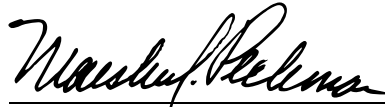
12           Finally, it is not unfair to require Defendants to move forward with the current preliminary  
13 injunction schedule. Plaintiffs have not operated outside of the parties' agreed schedule. And the  
14 June 18-21 hearing is a preliminary injunction hearing; it is not a trial. A continuation is not  
15 warranted.

16           Weyerhaeuser also moves to strike the deposition of Joseph Buchanan on the grounds that it  
17 is an impermissible use of a deposition under Fed. R. Civ. P. 32. The Court addresses this issue more  
18 thoroughly in a contemporaneously issued order on State Defendants' surreply. In short, Fed. R. Civ.  
19 P. 32(a)(2) does not provide a basis to exclude Mr. Buchanan's deposition, and Plaintiffs will have an  
20 opportunity to lay the foundation for admissibility of the deposition at the preliminary injunction  
21 hearing.

22           For these reasons, Weyerhaeuser's motion to strike the expert declarations of Carey,  
23 Rosenberg, and Glenn and the deposition of Joseph Buchanan is DENIED.

24           The clerk is instructed to distribute copies of this order to all counsel of record.

25           Dated: June 5, 2007.

26             
Marsha J. Pechman  
United States District Judge